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LABOR LAW—REMEDIES—An Assessment of the Proposed "Make-Whole" Remedy in Refusal-To-Bargain Cases

The conventional National Labor Relations Board (NLRB) remedy against an employer who has violated section 8(a)(5)[1] of the National Labor Relations Act (NLRA) by refusing to bargain with a properly certified union is a cease-and-desist order coupled with a directive ordering the employer to bargain with the union at the union's request. However, the interval between an employer's initial refusal to bargain and the final entry of a court of appeals' decree enforcing the NLRB's order to bargain has often been of such long duration[2] that unions have complained that the conventional remedy is relatively meaningless and ineffective. The unions' first argument is that the NLRB order is inadequate because it does not compensate employees for the "loss" of the economic benefits which they might have received from the employer if collective bargaining had taken place. The unions also argue that since the normal cease-and-desist remedy does not require the employer to make good these "losses," many employers are actually encouraged to violate section 8(a)(5) in order to gain time during which they do not have to confer any benefits. In short, the argument is that an employer has much to gain by deliberately violating the NLRA, since all he presently risks by such conduct is a mild reprimand in the form of a cease-and-desist order.[3] In four recent NLRB cases, including the celebrated *Ex-Cell-O* case,[4] several unions have argued that a provision for restoring the "lost benefits" of collective bargaining to employees—that is, a "make-whole" order—should be included in the remedy for an employer's unlawful refusal to bargain.[5]

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1. 29 U.S.C. § 158(a)(5) (1964). Section 8(a)(5) provides that it will be an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159(a) of this title."

2. The AFL-CIO has stated that the average time for this process is 30.3 months. Brief for the Charging Party at 9-10, app. A, Ex-Cell-O Corp., Case No. 25-CA-2377 (trial examiner's decision rendered March 7, 1967). Schill Steel Prods., Inc., 161 NLRB 939 (1966), provides an illustrative example of the problem: "On January 13, 1965, the Court of Appeals . . . issued its decision . . . including its order to bargain. On January 13, 1965, the Respondent advised the Union that it was now willing to recognize the Union pursuant to its certification of August 31, 1962 . . . ." 161 NLRB at 940.

3. An order directing an employer to cease and desist from refusing to bargain after the employer has successfully postponed collective bargaining for several years assertedly constitutes nothing more than a "slap on the wrist." Brief for the Charging Party, *supra* note 2, at 5. For an effective presentation of the union arguments *see* Schlossberg & Silard, *The Need for a Compensatory Remedy in Refusal-to-Bargain Cases*, 14 WAYNE L. REV. 1059 (1968). The authors are counsel for the union (charging party) in Ex-Cell-O Corp., Case No. 25-CA-2377 (trial examiner's decision rendered March 7, 1967).

4. Case No. 25-CA-2377 (trial examiner's decision rendered March 7, 1967).
Lumber Co., Case No. 26-CA-2536 (trial examiner's decision rendered Jan. 4, 1967);

5. On July 13, 1967 the NLRB heard oral argument on four cases in which the pro-

The unions' proposed strengthening of the remedy granted for employer violations of section 8(a)(5) poses both practical and theoretical problems. For instance, while it would be difficult for the union to show to what extent its members were actually injured by the employer's violation, its failure to prove actual injury arguably renders its request for lost benefits so speculative that it would

posed remedy was requested, but has yet to render a decision. The cases are Ex-Cell-O Corp., Case No. 25-CA-2377 (trial examiner's decision rendered March 7, 1967); Herman Wilson Lumber Co., Case No. 26 CA-2536 (trial examiner's decision rendered Jan. 4, 1967); Zinke's Foods, Inc., Case No. 30-CA-372 (trial examiner's decision rendered Dec. 18, 1966); Rasco Olympia, Inc., Case No. 19-CA-3187 (trial examiner's decision rendered Dec. 9, 1966). In *Ex-Cell-O*, the union had won a representation election in October 1964, and was certified by the NLRB's Regional Director. The employer's request for review was filed and granted, but its objections to the validity of the election were overruled and the NLRB affirmed certification of the union in October 1965. Ex-Cell-O notified the union that it would refuse to bargain in order to obtain judicial review of the NLRB's certification decision. a so-called "technical" 8(a)(5) violation. Brief for the Respondent at 4-5. *See* text accompanying notes 32 & 33 *infra*. No other unfair labor practice has been charged. It is to be noted that over four years have passed since the union won the representation election, and it has been more than three years since the NLRB's decision to affirm certification; Ex-Cell-O's employees are still without representation at the bargaining table. If the customary order is given to remedy the 8(a)(5) violation, it will merely direct Ex-Cell-O to begin bargaining.

The other three cases are distinguishable in some respects. In *Herman Wilson Lumber Co.*, conduct by the employer in violation of section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1) (1964), as well as in violation of section 8(a)(5) is charged. In *Zinke's Foods*, the employer's lack of a good faith doubt as to the union's majority status (established by authorization cards) as evidenced by "flagrant" violations of section 8(a)(3) of the NLRA, 29 U.S.C. § 158 8(a)(3) (1964), and section 8(a)(1), produced the unlawful refusal to bargain charge. *See* TXD—662—66, at 15 (Dec. 18, 1966) (trial examiner's decision).

The fourth case, *Rasco Olympia*, is not a first contract bargaining situation. The unfair labor practice charge arose when, upon expiration of the old contract, respondent refused to bargain over terms of a new contract. The issue of a compensatory remedy in these circumstances was eliminated by the unions in order to focus attention on the three cases involving newly certified unions. During oral argument it was stated:

> Counsel for the union think [that a successor contract case] is not the kind of case in which the great need for the compensatory remedy is present as it is in the first contract case.
>
> We would hope that if you decide to fashion a compensatory remedy for the first contract cases that you will, in due course . . . find it suitable and appropriate to apply compensatory remedies to cases like *Rasco* . . . . [T]he Board might properly consider the application of the compensatory remedy on a first contract basis and defer until future experience . . . the necessity . . . of applying it to successor contract situations.

Official Report of Proceedings Before the NLRB, Docket No. 25-CA-2377 *et al.*, oral argument, July 13, 1967, at 256-58.

The NLRB is faced with divergent views among its trial examiners as to whether compensation awards are justified. The remedy was rejected by the trial examiners in Herman Wilson Lumber Co., Case No. 26-CA-2356 (trial examiner's decision rendered Jan. 4, 1967); General Automation Mfg., Inc., 167 N.L.R.B. No. 66 (1968); Triangle Plastics, Inc., 166 N.L.R.B. No. 86 (1967); Monroe Auto Equip. Co., 164 N.L.R.B. No. 144 (1967); United Ins. Co., 162 N.L.R.B. No. 33 (1967); Saks & Co., 160 N.L.R.B. No. 682 (1966); Preston Prods. Co., Inc., 158 N.L.R.B. 322 (1966), *enforced sub nom.* UAW v. NLRB, 373 F.2d 674 (D.C. Cir. 1967). However, the remedy was accepted by trial examiners in Indianapolis Glove Co., Inc., 167 N.L.R.B. No. 61 (1968); Ex-Cell-O Corp., Case No. 25-CA-2377 (trial examiner's decision rendered March 7, 1967); Zinke's Foods, Inc., Case No. 30-CA-372 (trial examiner's decision rendered Dec. 18, 1966).

amount to a plea for a "punitive" remedy—a type of relief which the NLRB is not authorized to give. Employers also contend that the unions' proposed remedy is not comparable to a back pay award, but that it is designed merely to compensate generally for the lost opportunity to bargain. According to the employers, when viewed in this light, the make-whole remedy amounts to nothing more than having the NLRB award general damages—again, something which it is not generally empowered to do. It is also possible to argue that the make-whole remedy infringes the employer's "right" to violate "technically" section 8(a)(5); such a violation is the only way an employer may obtain judicial review of NLRB certification decisions. Finally, assuming that these problems may be resolved in favor of the make-whole remedy, consideration must also be given to the possibility that the imposition of this remedy contravenes the policy expressed in section 8(d) of the NLRA. Section 8(d) states that the Act "does not compel either party to agree to a proposal or require the making of a concession,"[6] and it may be argued that the make-whole remedy is equivalent to having the NLRB dictate the substantive terms of a collective bargaining agreement.[7]

The question of whether the NLRB has the authority to make such an order in the first instance is of primary importance in establishing the availability of the make-whole remedy. Section 10(c) of the NLRA allows the NLRB to order such "affirmative action . . . as will effectuate the policies of the [Act]."[8] Although a literal reading of this section would seem to provide adequate authority,[9]

6. 29 U.S.C. § 158(d) (1964).

7. For an effective presentation of employer arguments, *see* McGuiness, *Is the Award of Damages for Refusals To Bargain Consistent with National Labor Policy?*, 14 WAYNE L. REV. 1086 (1968). Mr. McGuiness is counsel for the employer (respondent) in Ex-Cell-O Corp., Case No. 25-CA-2377 (trial examiner's decision rendered March 7, 1967).

8. 29 U.S.C. § 160(c) (1964), which reads in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in . . . any such unfair labor practice, then the Board shall . . . take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter.

9. In Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941), the Supreme Court discussed the NLRB's remedial powers:

> [C]ongress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion . . . .

And in Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 540 (1943), the Court, in affirming a lower court's enforcement of an NLRB order reimbursing employees for dues deducted from wages to support an illegal company union, stated: "We give considerable weight to that administrative determination. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."

the Supreme Court has held that section 10(c) does not authorize the NLRB to issue "punitive" orders, even if such orders are intended to deter violations of the NLRA.[10] Since NLRB orders must be strictly remedial, it follows that orders directing an employer to make money payments must be compensatory; such orders cannot constitute a penalty or a fine.[11] Thus, it seems that any order requiring that an employer pay money to "make" employees "whole" must be based upon losses that can actually be proved to have resulted from the employer's unlawful refusal to bargain.[12] If the union seeks damages under section 10(c) by showing compensable loss, its first step must be to show that its members suffered a loss when bargaining was unlawfully delayed.

The success of a claim that union members suffer a loss when an employer refuses to bargain in violation of section 8(a)(5) depends upon the union's ability to establish three propositions: (1) that collective bargaining would in fact have resulted in an agreement had the employer bargained originally; (2) that such an agreement would have provided the employees with benefits greater than those which they actually received during the period of the employer's refusal to bargain with the union; and (3) that these lost benefits can be measured in some reasonably accurate manner.

To support the contention that a contract would have been reached had the employer bargained initially, the unions stress that a recent study indicates that 86 per cent of newly certified unions successfully negotiate contracts in those cases where employers bargain voluntarily.[13] Moreover, the study concludes that a contract is

10. *See, e.g.*, Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-36 (1938), where the Court stated:

> [A]uthority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such on order.

11. Republic Steel Corp. v. NLRB, 311 U.S. 7, 10, 11 (1940).

12. In Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651, 655 (1961), an NLRB order requiring the refunding of dues and other assessments to members when their union acted in violation of section 8(b)(1)(A) of the NLRA, 29 U.S.C. § 158(b)(1)(A) (1964), and section 8(b)(2) of the NLRA, 29 U.S.C. § 158(b)(2) (1964), was overturned because

> Where no membership in the union was shown to be influenced or compelled by reason of any unfair labor practice, no "consequences of violation" are removed by the order compelling the union to return all dues and fees collected from the members; and no "dissipation" of the effects of the prohibited action is achieved . . . . The order in those circumstances becomes punitive and beyond the power of the Board.

Cf. Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 544 (1943), where union dues were refunded to workers: "[The Board's order] returns to the employees what has been taken from them to support an organization not of their free choice . . . . [The] assumption that employees receive no benefit . . . is possible . . . . [W]e hold that the Board made an allowable judgement." *See also* Franks Bros. Co. v. NLRB, 321 U.S. 702, 704 (1943); NLRB v. Link-Belt Co., 311 U.S. 584, 600 (1941); International Assn. of Machinists v. NLRB, 311 U.S. 72, 82 (1940).

13. *See* Ross, *Analysis of Administrative Process Under Taft-Hartley*, 1966 LAB. REL.

reached in only 36 per cent of the cases in which recalcitrant employers are compelled to bargain under court order.[14] The unions claim that these statistics demonstrate that the lack of success in dealing with an employer who is under court order to bargain is attributable to the deleterious effects on union bargaining strength occasioned by the employer-induced delay in recognizing the union. In other words, the union contention is that a delay in beginning collective bargaining serves to dissipate union strength because employees gain no additional benefits during the delay period.[15] The ultimate effect of this delay—according to the unions—is probably to prevent an agreement that would have been the likely result had bargaining taken place originally. This argument assumes, however, that the failure to agree while bargaining under a court order is due solely to the dissipation of union strength—a conclusion which does not necessarily follow. For example, it is certainly possible that if the union in fact had significant strength or status at the time of the employer's refusal to bargain, such strength would have manifested itself in an unfair labor practice strike designed to force the recalcitrant employer to the bargaining table. Therefore, it seems reasonable to conclude that a union which is too weak to negotiate a contract with an employer who is under court order to bargain was probably also weak at the time of its certification.[16] Indeed, the

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YEARBOOK 299, 306 (1967). This study is based on an examination of 1,008 cases closed by the NLRB between 1957 and 1962 in which there was a finding or an inference of a violation of the duty to bargain imposed by section 8(a)(5) of the NLRA. *Id.* at 299. *See* Schlossberg & Silard, *supra* note 3, app. ix, at 1082-85.

14. Ross, *supra* note 11, at 302.

15. "The Employer may well escape with no contract at all because the initial organizing strength has meanwhile been so eroded that he can outlast a strike and break union representation entirely." Brief for the Charging Party, *supra* note 2, at 19.

16. Illustrative of the problem weak unions face in obtaining recognition was the strike called when the Herman Wilson Lumber Company first refused to bargain with the woodworkers' union after NLRB certification.

> We struck for 2 weeks . . . and everybody went back . . . because they were intimidated, and for other reasons. . . .
>
> . . . .
>
> It was a totally ineffectual manner for enforcing the certification and obligation to bargain.

Oral argument by Mr. James Youngdahl for International Woodworkers of America, Official Report of Proceedings, *supra* note 5, at 187.

Although the *bargaining status* of the union when negotiations finally begin may have been weakened by loss of loyalty among the membership, it is possible that a delay would not have had a fundamental effect upon the *economic power* it commanded—and it is the latter that will ultimately determine whether a contract agreement will be reached. For example, arguably it is harder to get workers to strike over recognition than over specific economic issues, where the purpose of the strike is easily discernible to the employees. It would follow that loss of loyalty after a two- to four-year period without bargaining might not seriously affect a union's power to call an economic strike over a concrete dispute about proposed contract terms once bargaining began, and thus that its economic power was not diminished. This might not be the case, however, if the employer unilaterally granted some benefits to the

statistics relied upon by unions to show that union bargaining status declines during this refusal period may in fact demonstrate that an employer who refuses to bargain with a certified union in the first instance is likely to be a hard bargainer who is unwilling to deal with unions.[17] By this analysis, it is doubtful whether the union would ever have negotiated a more beneficial agreement with the employer even if the latter had bargained in compliance with the NLRA.[18]

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employees during the period of the refusal to bargain, and thus further undercut loyalty to the union.

On the other hand, when an employer first violates section 8(a)(5) following union certification, an unfair labor practice strike would seem easier to call, not only because of greater loyalty to the union at that time but also be cause—unlike the case of an economic strike growing out of negotiations following immediate recognition (without an 8(a)(5) violation)—the workers would not be striking under the threat of permanent replacement. *Compare* NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938) (employer may hire permanent replacements for those employees participating in an economic strike) *with* Collins & Aikman Corp., 165 N.L.R.B. No. 76 (1967) (employer is not free to hire permanent replacements for those employees participating in a strike called because of the employer's unfair labor practice). Thus, although it may be harder to get members to strike over non-recognition that constitutes an unfair labor practice than over economic issues, the problem would seem to be counterbalanced by the additional safeguards provided to workers who are engaged in an unfair labor practice strike. In short, it seems doubtful that mere delay in bargaining lessens the opportunity that a contract agreement will be reached because the union has thereby been weakened. Loyalty to the Union following immediate recognition which could have been drawn upon as a strike threat in order to obtain concessions at the bargaining table would seemingly have been used to force recognition through an unfair labor practice strike in those cases where the employer refused to bargain at all. If such loyalty was not sufficient to force recognition, it is indeed questionable that it ever could have forced bargaining concessions. Therefore, it is arguable that a union which cannot force an employer to bargain at the outset really has not lost anything in the intervening refusal period—it never had the requisite strength with which to command anything in the first instance.

17. *See* Ross, *supra* note 13, at 307, where the suggestion is made that employers engaging in conduct violative of section 8(a)(5) characteristically are unwilling to deal with unions:

> [I]t is not time alone which accounts for the differences in bargaining results . . . it is the nature of the employer determination to resist his bargaining obligations, as expressed in his unlawful behavior . . . . It appears far more reasonable and consistent with the evidence to assume that employers violate Section 8(a)(5) because they don't like unions and prefer not to engage in any kind of collective bargaining.

In oral argument before the NLRB, the fundamental antiunion attitude of section 8(a)(5) violators was impliedly admitted by counsel for the AFL-CIO when discussing whether the proposed remedy should be given only in cases of "bad faith" refusals to bargain and not in situations where the unfair labor practice was committed in order to obtain judicial review of an NLRB certification decision (*see* text accompanying notes 33 and 34 *infra*):

> If the Board awards damages to only non-technical violation cases, it would be damages to particularly hard bargaining situations where the employer is violently anti-union . . . where there is least probability of loss . . . . [Furthermore] the "technical [violation]" is part of a standard anti-union arsenal of employers and [in] the South, in particular, part of a standard thing that they do to defeat and to also delay the union representation.

Official Report of Proceedings, *supra* note 5, at 181-82.

18. An employer may be required to bargain under the NLRA, but he is not required to reach agreement. NLRB v. American Natl. Ins. Co., 343 U.S. 395, 402

It may be possible for the union attempting to demonstrate that its members have suffered compensable loss to sidestep proving the probability that a collective bargaining agreement would have been reached by arguing that in fact such proof should not be a prerequisite to awarding the make-whole remedy. Support for this contention may be found by way of analogy to the Supreme Court's decision in *Fibreboard Paper Products Corporation v. NLRB.*[19] In that case the employer's failure to negotiate with the union before he unilaterally contracted certain maintenance work out of the bargaining unit was held to be a violation of section 8(a)(5). Since all maintenance workers had been discharged as of the expiration date of the existing maintenance contract, the NLRB ordered the employer to bargain with the union over the contracting-out decision. The NLRB also directed the employer to reinstate the discharged employees with back pay for the period of the layoff; the back pay award was based upon the terms of the *expired* contract. The Supreme Court upheld this remedy, stating: "There has been no showing that the Board's order restoring the *status quo ante* to insure meaningful bargaining is not well designed to promote the policies of the Act."[20]

Since the decision to contract out the maintenance work could have been made even if the matter had been discussed with the union,[21] it could be contended that there was no basis upon which to award compensatory damages to the discharged employees because there was no showing of actual loss.[22] However, such an argument would seem to have been at least implicitly rejected by the Court's decision.[23] The *Fibreboard* opinion did not address the question of

(1952). Good faith bargaining may lead not to a contract but to an impasse. *See* text accompanying notes 40 and 41 *infra.*

19. 379 U.S. 203 (1964).

20. 379 U.S. at 216.

21. Fibreboard claimed that substantial savings would be effected by contracting out maintenance work. Ben Wilson, Director of Purchases for Fibreboard, testified, "we felt that economies up to one-third of that total were entirely possible . . . . [T]he cost of maintenance and power house work was ¾ million dollars per year." Record at 131, Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964). The NLRB agreed that the company's motive in subcontracting was economic rather than antiunion; but nevertheless the NLRB remedied the section 8(a)(5) refusal to bargain violation by basing the back pay on the terms of the expired contract.

22. This issue was not argued in *Fibreboard.*

23. There would be little motivation for an employer to refrain from violating section 8(a)(5) where a decision to subcontract is to be made if he could claim that any back pay remedy is inappropriate because his final decision would not have been different even if he had behaved legally and bargained with the union. One would surely not expect such conduct to be deterred merely by an order to bargain after the decision to subcontract has been made and implemented. In order to give section 8(a)(5) any meaning at all in these situations, effective remedies for violations must be devised. Thus back pay has been awarded in a number of cases where workers have been released following a unilateral management decision to subcontract work out of the bargaining unit, even though the result might well have been the same if

whether the employer would have made the same decision if he had bargained; rather, the Court relied on the illegality under section 8(a)(5) of the employer's decision in upholding the back pay remedy. Thus, by analogy to *Fibreboard,* the make-whole remedy requested in *Ex-Cell-O* and its companion cases could be approved without proof of whether a contract would in fact have resulted if bargaining had taken place. The unions can argue that the employer's illegal conduct should preclude any consideration of such a question.

Of course, the NLRB may agree with the unions' present argument—resting on the statistics mentioned earlier—that it is likely that a collective bargaining agreement would have been reached; alternatively, it could adopt the argument advanced in this Note that the union does not have to prove that it was probable that an agreement would have been concluded if bargaining had occurred. In either case, two troublesome and interrelated problems of proof still remain: whether the employees have irretrievably lost certain benefits because an agreement was not concluded; and whether there is an accurate way to calculate the amount of any such losses. Employers have generally contended that these two problems clearly reveal that the make-whole remedy is essentially penal.[24] It is pointed out that collective bargaining contracts frequently do not produce increased employee benefits and thus that actual loss does not necessarily occur simply because of the absence of a contract.[25] Further-

bargaining over the subcontracting decision had occurred. *See, e.g.,* NLRB v. Winn-Dixie Stores, Inc., 361 F.2d 512 (5th Cir.), *cert. denied,* 385 U.S. 935 (1966); NLRB v. American Mfg. Co., 351 F.2d 74 (5th Cir. 1965). In *NLRB v. American Mfg. Co.,* the court awarded back pay while recognizing that bargaining may not in any way change the employer's final decision about subcontracting: "[T]he Act . . . is still based on voluntary bargaining. To require bargaining is not to require a bargain. . . . When it bargains, it must do so in good faith. But on this major issue, it may bargain to the bitter end of a real impasse." 351 F.2d at 80. Nonetheless it found the back pay order "reasonably needed to effectuate the policies of the Act." 351 F.2d at 81.

And in the successor-employer situation, where the purchaser of a concern refuses to bargain with the employees in the newly acquired plant and no significant change in the work to be performed is contemplated, the possibility that a less favorable contract would emerge from bargaining sessions between the union and the new employer has not barred NLRB imposition of a back pay award based upon the old contract. This is true even though by the terms of purchase no contractual obligations of the preceding owner were assumed:

> As it is speculative, and cannot be determined, what rate or rates of pay might have governed their employment had the Respondent fulfilled its obligation to bargain with their representative, and as in any event their existing rate could not have been changed until and unless the Respondent had fulfilled its bargaining obligation, we shall direct that backpay due them shall be computed at the rate provided in the contract governing their employee relationship at the time Respondent acquired the enterprise.

Chemrock Corp., 151 N.L.R.B. 1074, 1082 (1965).

24. *See* McGuiness, *supra* note 7, at 1088-91.

25. Indeed, as McGuiness points out, bargaining may lead to an impasse, "[f]ollowed by a legitimate strike, lockout or permanent plant closure." *Id.* at 1089. In such situations, although good faith bargaining has occurred, a complete *loss* of earnings results.

more, the employers contend that if any losses do exist, they are purely speculative. However, it is submitted that the issues of loss and loss measurement should not be dismissed on abstract theoretical grounds before the particular union in a given case has been afforded an opportunity to prove that it has in fact suffered a loss.

In order to show that employees have lost *some* benefits as a result of an employer's violation of section 8(a)(5), a union might rely upon reasonable inferences drawn from an analysis of the many factors which affect the collective bargaining process. For instance, the relative increase in plant productivity and profits during the refusal-to-bargain period might be shown to be grossly disproportionate to any actual increase in employee wage levels or benefits. A union might also point to its successful demands for increased employee benefits at similar businesses in the same locale,[26] or to the success of its bargaining with the same employer in different areas or at other plants.[27] On the other hand, the employer should be permitted to show that such factors do not reveal a consistently successful pattern of union bargaining. For instance, an employer might be able to demonstrate that certain conditions render an apparent pattern of union-instigated wage increments inapplicable to the particular case in question. The NLRB, balancing these considerations, could conclude that the union has established with reasonable probability that an employer's refusal to bargain caused a loss to the employees. In those cases in which such a probability is determined to exist, the union's case for the make-whole remedy should be considered established; of course, the problem of assigning a dollar value to the loss for which employees are to be made whole remains.

It is at this point that the employers contend that any method of measuring such loss would be so speculative as to amount to a pen-

26. The union in *Herman Wilson Lumber Co.* suggested the average increases they negotiated with Arkansas-located employers engaged in the manufacture and sale of lumber and related products as a yardstick. TXD—757—66, at 6 (Jan. 4, 1967). A similar proposal using median wages paid by food markets of comparable size in the Beloit, Wisconsin, area under contract with Retail Clerks Union Local No. 1401 was made in Zinke's Foods, Inc.. TXD—662—66, at 20-21 (Dec. 18, 1966). In *Ex-Cell-O Corp.*, the UAW offered the comparison of direct and indirect increases received by employees in *Ex-Cell-O*'s Elwood plant—where the controversy arose—with the average increases negotiated by the UAW and other Indiana employers engaged in the manufacture of precision parts and machinery. Brief for the Charging Party, *supra* note 2, at 15.

27. In *Ex-Cell-O*, evidence was offered of the contract benefits the union had obtained from the Respondent at three plants in Ohio and five in Michigan. There is a "certain degree of uniformity among the contract provisions covering the employees of all these plants," the trial examiner reported, and significant differences did exist between these provisions and the terms and conditions of employment of the Elwood employees. Supplemental unemployment benefits, contractually guaranteed cost-of-living adjustments, and medical and insurance provisions either were more limited in scope or were not provided at all to the workers in the unorganized plant. TXD—80—67, at 13-14 (March 7, 1967).

alty. The speculative aspects could be said to result from the union's inability to reduce the theoretical factors of loss to specific dollar amounts. For example, employers may object to union reliance upon statistical data such as average wage increments gained from collective bargaining throughout the nation in the same industry;[28] the use of average data does not necessarily provide a reliable standard of loss in any given case. The "average wage increment" may have been skewed by very large gains in one settlement, although small gains, no gains, or even losses predominate in the remaining cases. Moreover, use of the "average bargaining settlement" as a gauge of employee loss in a particular case will necessarily fail to take into account the myriad variables which affect the process of collective bargaining. Such factors include the economic situation at a particular plant, the degree of collective bargaining maturity exhibited in the past by the parties to the dispute, the parties' relative economic strength, the nature of proposals and counterproposals,[29] and the individual personalities of the bargaining parties. On the other hand, it seems that if these factors are considered along with "average settlement" data, the results, although not exact, would be more than purely speculative. The lack of an exact measure for determination of the employees' loss should not lead to the conclusion that any attempt to approximate damages renders the make-whole proposal a penalty. What is really at stake is the possibility of overestimating that loss which *has* occurred because of the employer's unlawful refusal to bargain as opposed to allowing no compensatory remedy at all for that violation. In this situation, the equities clearly lie with granting a remedy. Defining the exact loss must be a subsidiary goal. Once the existence of a loss is established satisfactorily, the sound principle is to attempt to determine its extent as accurately as possible.[30] Again, exact measurement is not the test; it is

28. Wage increment data is summarized annually by the Bureau of Labor Statistics (BLS). In Herman Wilson Lumber Co., Case No. 26—CA—2536 (trial examiner's decision rendered Jan. 4, 1967), it was proposed that the BLS average figures of negotiated increases with companies in the geographical area, involved in the particular industry, or engaged in the manufacture and sale of lumber and related products generally, could be compared with Herman Wilson's employees' economic gains during the period of the section 8(a)(5) violation. *See* TXD—757—66, at 6 (Jan. 4, 1967) (trial examiner's decision). The difference in these amounts was used to measure the benefits employees lost because of the unlawful refusal to bargain. For similar proposals in other cases, *see* notes 22 & 23 *supra*.

29. For example, the union might be willing to forgo increased wages for its members in exchange for a union security agreement.

30. When certainty in the *fact* of damage is established in cases involving employer unfair labor practices in discriminatorily discharging employees, the major issue becomes finding a reasonable method to determine loss. *See* F. W. Woolworth Co. v. NLRB, 121 F.2d 658 (2d Cir. 1941). By analogy, certainly in the fact of damage in the instant situation may result from the "lost opportunity to bargain" because of the employer's unlawful refusal to bargain, assuming that loss has been established as suggested in this Note. Thereafter the concern is, of course, to determine the probable

reasonably accurate measurement.[81]

monetary loss incurred by the employees. It has been suggested that the Bureau of Labor Statistics' data on wage increments gained in collective bargaining nationally should be prima facie evidence of the amount of the loss, rebuttable whenever the employer or union could show by relevant data that other figures—higher or lower—are more appropriate. An example of other relevant data might be the gains achieved by the same union in collective bargaining with the same company at other locations. *See* notes 26 & 27 *supra.*

It has also been suggested that a supplemental hearing could be held by the NLRB to determine the employee loss on the basis of statistical data and other evidence submitted by the complainant union and the respondent employer.

31. *See, e.g.*, F. W. Woolworth Co. v. NLRB, 121 F.2d 658 (2d Cir. 1941) where an estimate of back pay due was based upon the assumption that the ratio of union men to nonunion men among the employees discharged in a nondiscriminatory layoff would have been the same as in the plant as a whole. For the number of union men actually laid off which exceeded the number of union men "reasonably to be expected to be laid off," back pay accumulated. The NLRB order directed that this back pay was to be distributed among all the discriminatorily discharged workers. "[T]he Borad was forced to use hypothesis and assumption instead of proved fact. But its order is not invalid on that account . . . . 'Certainty as to the amount goes no further than to require a basis for a reasoned conclusion.'" 121 F.2d at 663.

In NLRB v. Brown & Root, Inc., 311 F.2d 447 (8th Cir. 1963), a proceeding in which respondent, Brown and Root, Inc., disputed the NLRB's method for calculating back pay, the Court enforced the NLRB's order, stating:

> We have held that with respect to the formula for arriving at backpay rates or amounts which the Board may deem necessary to devise in a particular situation, "our inquiry may ordinarily go no further than to be satisfied that the method selected cannot be declared to be arbitrary or unreasonable in the circumstances involved."

311 F.2d at 452. *See also* Jack G. Buncher, 164 N.L.R.B. No. 31 (1967), where the extent of respondent's back pay liability was determined by assuming that a seniority system would have been utilized by the employer to select employees for retention, layoff, and recall, even though respondent did not, in fact, use such a system: "[T]he Board occasionally is required to adopt formulas which result in backpay determinations that are close approximations because no better basis exists for determining the exact amounts due." 164 N.L.R.B. No. 31 at 3.

To return once again to the *Fibreboard* decision, it seems clear that the make-whole remedy argued in that case represented only a reasonable approximation of employee loss. The NLRB back pay remedy was based upon the terms of an *expired* contract, although there was little reason to believe that a similar result would have been reached had the employer bargained. In fact, the likelihood was that employees either would have suffered a sharp decrease in wages or would have been permanently discharged, regardless of union opportunity to negotiate the matter. The Board found that the company's decision to subcontract was based on an economic—not antiunion—motive. *See* note 21 *supra.* Since substantial savings could be effected by subcontracting out maintenance work, it was most unlikely that the discharged maintenance employees would have ended up with terms equal to the expired contract if the company had decided to bargain over a new contract.

By way of analogy then, the speculation involved in the refusal-to-bargain situation seems no greater than that speculation which has already been sanctioned by the Supreme Court in *Fibreboard.*

The effect of wage increases in violation of section 8(a)(5) during the period of the unlawful refusal to bargain must also be considered. This problem was recently dealt with in Indianapolis Glove, Inc., 167 N.L.R.B. No. 61 (1968). The trial examiner determined that wage increases unilaterally passed on to employees during the period of the employer's unlawful refusal to bargain equalled or surpassed the gains they would have received through collective bargaining, measured by average wage increments for the period. The trial examiner's recommended order proposed that the employer be required to pay employees a sum equal to the value of the wage increases which would have been gained through collective bargaining to dissipate the

Assuming that the make-whole remedy is to be accepted on the grounds advanced above, several other plausible objections and qualifications to it must be considered. There is a question whether the make-whole remedy should be applicable to all violations of section 8(a)(5). Employer refusal-to-bargain cases may be conceptually classified depending upon the intent of the employer. The first type—the "bad faith" violation—may be said to involve the kind of conduct which section 8(a)(5) is specifically intended to correct: the refusal of an employer to negotiate with a majority union which he knows is an appropriate representative of his employees. The second type of violation—the so-called "good faith" or "technical" refusal to bargain[32]—involves an employer who has deliberately violated section 8(a)(5) in order to obtain judicial review of the appropriateness of the NLRB's decision to certify the union.[33] Despite the fact that employees may suffer lost benefits regardless of whether the employer's refusal to bargain was in "bad faith" or of the "technical" variety,[34] it is at least arguable that imposition of the make-whole

effects of the unfair labor practice; this order was not accepted by the NLRB. Under a theory of compensation, the employees had suffered no loss and the recommended order was clearly punitive. The case suggests that the proposed remedy, to remain strictly compensatory, would require deduction of any unilateral wage increases that have been granted to employees from the amount to be paid over to employees as compensation for losses suffered during the refusal-to-bargain period. If unions are granted the requested remedy, resolution of this problem will be necessary.

32. Ex-Cell-O admitted the underying facts constituting a section 8(a)(5) violation, justifying its action as a "technical" refusal to bargain done in order to obtain judicial review of the NLRB's certification of the union, *see* note 5 *supra*.

33. *See* Boire v. Greyhound Corp., 376 U.S. 473, 476-79 (1964). The Court stated at 476-77:

> [T]he final order[s] made reviewable by Sections 10(e) and (f) in the Courts of Appeals do not include Board decisions in certification proceedings. Such decisions, rather, are normally reviewable only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed as, for example, where an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit. In such a case, Section 9(d) of the Act makes full provision for judicial review of the underlying certification order . . . .

Section 9(d) of the NLRA, 29 U.S.C. § 159(d) (1964), reads in pertinent part:

> Whenever an order of the Board made pursuant to Section 160(c)[10(c)] of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of the section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

34. Good faith based upon an erroneous view of the law has never been a defense to a refusal-to-bargain charge. Thus, in IUE, Local 613, AFL-CIO v. NLRB, 328 F.2d 723 (3d Cir. 1964), an order of reinstatement with back pay was enforced even though workers were discharged under an agreement made by their union and the company which accorded superseniority rights to replacements hired during the course of an economic strike. It was argued that the NLRB's order would be inequitable because the company had acted in good faith, honestly believing that they had a right to adopt the job assurance plan agreed upon to protect replacements. 328 F.2d at 727.

remedy in the latter situation unduly prejudices an employer's right to obtain judicial review of NLRB certification rulings.[35]

However, an analysis of the purposes underlying the statutory provisions for judicial review of representation proceedings seems to indicate that there should not be any distinction drawn between "good faith" and "bad faith" violations of section 8(a)(5) with respect to the application of the make-whole remedy. In fact, automatic application of the remedy without regard to the suggested distinction would seem to further the purposes of the NLRA. Direct review of NLRB resolution of representation questions under section 9 of the NLRA was deliberately excluded from the statute because Congress determined that questions of representation should be decided expeditiously in order to accelerate the initiation of collective bargaining by the parties.[36] The employer could secure judicial review only by refusing to bargain and then asserting his objections to the section 9 proceedings as an affirmative defense to the ensuing unfair labor practice charge. Congress declined to change this method of review in 1947.[37] In an attempt to prevent frivolous claims, the employer can secure review of section 9 proceedings only by risking a determination that he has committed an unfair labor

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However, the court rejected this argument stating:

> We are of the view that good faith, based upon an erroneous interpretation of the law, is not available as a defense. . . . An employer who pursues a course of conduct later determined to be unfair labor practice does so at his peril. . . . The equities in this case seem to favor the employees; it would be inequitable to require them to absorb pay losses ascribable to the unfair labor practice of the Company.

388 F.2d at 727. *See also* Old King Cole, Inc. v. NLRB, 260 F.2d 530, 532 (6th Cir. 1958); Taylor Forge & Pipe Works v. NLRB, 234 F.2d 227, 231 (7th Cir. 1956). In *Fibreboard* there was no willful violation of section 8(a)(5) since the employer's decision to terminate the employees' jobs was based upon a mistaken belief that the decision to contract out maintenance operations for legitimate business reasons was a prerogative of management and not a mandatory subject of collective bargaining. *Fibreboard* was nonetheless held responsible for employee losses resulting from the job termination. *See* text accompanying notes 19 & 20 *supra*.

35. Thus it was argued in the Memorandum for the General Counsel at 2, Ex-Cell-O Corp., Case No. 25-CA-2377 (trial examiner's decision rendered March 7, 1967), that an order to bargain upon request "is sufficient where an employer refused to bargain simply to test the validity of an election proceeding [resulting in an NLRB decision to certify] and the issue to be litigated is not patently frivolous."

However, in assessing the merits of this contention the difficulty of distinguishing between "good faith" and "bad faith" refusals to bargain must be taken into account. In practice, most "bad faith" refusals are likely to be clothed in language which asserts "good faith" doubt as to the legality of the representation proceeding. There is presently no need to make any such distinction; the consequences of being held in violation of section 8(a)(5) have no meaningful impact depending upon either the "good faith" or "bad faith" of the employer. This is another area which will require careful case-by-case development if the proposed remedy is adopted along with the suggested distinction.

36. *See* Boire v. Greyhound Corp., 376 U.S. 473, 478 (1964); Note, *Labor Law—The Judicial Role in the Enforcement of the "Excelsior Rule"*, 66 MICH. L. REV. 1292, 1293 n.2 (1968).

37. 376 U.S. at 479.

practice.[38] Thus, the make-whole remedy imposes only an additional risk upon an employer; he can still seek review in the same way and the remedy will be applied only if the court of appeals rejects the employer's affirmative defense and finds that there was an 8(a)(5) violation. Conversely, the remedy will be unavailable to the union if the employer is able to prove the illegality of the section 9 proceedings. The only effect that the presence of the make-whole remedy will have is that it will force the employer to assess much more carefully the validity of his objections to the representation proceedings. Therefore, the contention that the make-whole remedy amounts to a destruction of the "right" of an employer to use this avenue of review amounts to nothing more than a plea for continuing the present impotency of the cease-and-desist order as a remedy for violations of section 8(a)(5). It seems clear that the present framework has encouraged frivolous attacks on the validity of the NLRB's resolution of questions of representation under section 9. The congressional scheme seems clearly designed to encumber the right of review in these situations;[39] thus, it is illogical to argue that Congress intended to permit employers—as a matter of right—to delay collective bargaining in this manner without any fear of the consequences of being found in violation of section 8(a)(5). The further argument that such a "right" has become customary practice only underscores the ineffectiveness of the existing remedy; it does not go to the issue of the NLRB's power to utilize the more effective make-whole remedy.[40]

Thus far it has been assumed that if the union could establish the propriety of the make-whole remedy, the employees would be compensated for their losses in money damages. However, the employers may argue that this remedy conflicts with section 8(d) of the NLRA which prohibits the NLRB from forcing "agreement" to a contract term upon the employer.[41] Under section 8(d), as inter-

38. The objective to avoid lengthy delays before certification became "final" could not have been realized if in addition to the representation proceeding Congress intended to add an unfair labor practice proceeding, involving hearings before the NLRB on the refusal-to-bargain charge, entry of an order to bargain, and litigation before a court of appeals on the petition to enforce the order before certification was to become "effective."

39. For an opposite conclusion, *see* Comment, *Employee Reimbursement for an Employer's Refusal To Bargain: The Ex-Cell-O Doctrine*, 46 TEXAS L. REV. 758, 774-75 (1968).

40. The existence of the "traditional" remedy seems to result only from the fact that the proposed remedy simply was not requested in the past; it does not seem to be the result of a purposeful selection of one remedy in the face of several alternatives. Mere novelty of the proposed remedy should not be a reason to reject it. *See* H. W. Elson Bottling Co., 155 N.L.R.B. 714, 715 (1965), *enforced as modified*, NLRB v. Elson Bottling Co., 379 F.2d 223 (6th Cir. 1967).

41. 29 U.S.C. § 158(d)(1964), which reads in pertinent part: "[The obligation to bargain collectively] does not compel either party to agree to a proposal or require

preted by the Supreme Court, "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."[42] In reliance on section 8(d), the employers make two separate objections to the proposed remedy. The first, of course, is that the NLRB's determination to award damages for past losses serves to force—at least indirectly—a substantive contract on the employer. However, a closer examination of the policy underlying section 8(d) reveals that the section does not necessarily qualify a make-whole remedy designed to dissipate the effects of the employer's *past* illegal conduct. Section 8(d) is designed to prevent NLRB interference with ongoing union-employer negotiations over the contract terms to apply to the parties *in the future*.[43] The give-and-take of the bargaining process, intended to be insulated from the NLRB by section 8(d),[44] will not be disturbed by the proposed remedial order. This analysis is borne out by the NLRB practice of awarding back pay to employees who have suffered loss because of a unilateral employer decision to subcontract work out of the bargaining unit. Such back pay awards are determined by using the terms of an *expired* contract.[45]

An employer could, however, argue that the make-whole remedy does interfere with the *present* process of bargaining. The basis of this second argument would be that while the remedy does not specifically mandate any contractual term, it has the *practical* effect of doing so because of the expectations which it creates in the union. In other words, the employer may legitimately argue that the union will base its bargaining position when the employer finally comes to the table on the terms that the NLRB awards in its remedy for

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the making of a concession . . . ." *See* Brief for the Respondent at 11-20, Ex-Cell-O Corp., Case No. 25-CA-2377 (trial examiner's decision rendered March 7, 1967).

42. NLRB v. American Natl. Ins. Co., 343 U.S. 395, 404 (1952). *See also* NLRB v. Insurance Agents' Intl. Union, 361 U.S. 477, 487 (1960): "[I]t remains clear that § 8(d) was an attempt by Congress to prevent the Board from controlling the setting of the terms of collective bargaining agreements."

43. Section 8(d) provides that "[f]or purposes of this section" collective bargaining shall not mean the making of concessions. *See* note 41 supra. "This section" refers to section 8(d), not section 10(c). Thus section 8(d) would appear to be definitional: it relates to the meaning of "good faith bargaining," not to remedies once the question of good faith bargaining has been answered. *See* United Steelworkers of America v. NLRB, 389 F.2d 295, 299 (D.C. Cir. 1967). *Cf.* Schlossberg & Silard, *supra* note 3, at 1073-77.

44. Prior to the enactment of section 8(d) in 1947, the NLRB, under the guise of determining whether or not employers had bargained in good faith, had been examining the bargaining and judging what concessions an employer was required to make and what proposals and counterproposals he could or could not advance. The legislative history of section 8(d) is discussed in NLRB v. American Natl. Ins. Co., 343 U.S. 395, 402-04 (1952).

45. *See* text accompanying notes 20-23 *supra;* cases cited at note 23 *supra.*

past misdeeds. The union may therefore come to the bargaining table expecting no less than similar terms in the new contract.[46]

This theoretical possibility is analagous to the employer's argument that because the proposed remedy is imprecise, it is therefore improper. The answer to the employer's argument should therefore be the same in both contexts. That is, the NLRB is faced with a policy choice between awarding *no* damages where there has clearly been a violation of the NLRA by the employer or providing a remedy which *theoretically* may prejudice subsequent employer interests. As was true with the speculative remedy argument, the equities clearly favor granting the remedy. Experience may someday show that the remedy has such detrimental effects on future bargaining between the parties that it is not desirable. However, until such data is compiled, the NLRB should experiment with this proposed remedy, particularly since it is apparent that the present pattern of remedies is incapable of dealing with these refusal-to-bargain situations. Moreover, a recent case in the Court of Appeals for the District of Columbia Circuit clearly indicated that any conflict between an order designed to remedy a section 8(a)(5) violation and the dictates of section 8(d) is to be resolved in favor of the former section.[47] That case is of vital concern because it did not involve reference to an expired contract, as in *Fibreboard,* but rather contained a *requirement* by the NLRB that the parties include a specific term in a contract to be negotiated *in the future.*

In spite of these arguments, the NLRB may feel that any potential conflict with section 8(d) would be avoided more effectively by basing the terms of the make-whole remedy on an agreement negotiated by the parties themselves once bargaining begins. If this method were adopted there could be no argument that the NLRB has forced contract terms on the employer, since the terms would be promulgated by the involved parties.[48] The NLRB would not be required to determine employee losses. To effectuate this form of

46. St. Antoine, *A Touchstone for Labor Board Remedies,* 14 WAYNE L. REV. 1039, 1054 (1968).

47. United Steelworkers of America v. NLRB, 389 F.2d 295 (D.C. Cir. 1967). In this case the court conceded that the remedial order requiring an employer to accept a dues check-off provision impinged to some extent upon the freedom of contract policy underlying the NLRA, but found that it sufficiently furthered another basic purpose of the statute by protecting the collective bargaining rights of employees. The court felt that the advantages gained by granting the remedy outweighed the disadvantage of compelled acceptance of a provision which was "at most a minor intrusion on freedom of contract." 389 F.2d at 300-02. The applicability of the latter reasoning to a situation where the NLRB remedy has the practical effect of setting a wage floor for future contract negotiations is unclear. Certainly this distinction will have to be dealt with if the proposed remedy is adopted.

48. This approach would more closely resemble the result in *Fibreboard,* in which the remedy was based on a contract that the parties themselves had previously negotiated. *See* text accompanying note 21 *supra.* However, this Note maintains that

the proposed remedy, it would be sufficient to give retroactive effect to the wage terms agreed upon after enforcement of the NLRB's order to bargain has been secured and negotiations have taken place. That is, *new* agreements would serve as the basis for determining loss for previous employer violations.[49]

Determination of the amount of the remedy by the parties has several distinct drawbacks, however. The first objection is that the method does not accurately reflect the injury that the employees have suffered, since measurement of lost benefits which should have derived from contract terms negotiated in the past will be made in the context of the current strength of the parties.[50] The unions also contend that if the employer is aware of the retroactive impact of the contract once he begins bargaining, his concessions will necessarily be more narrow. Thus, they feel that the contract which would eventually result cannot be as favorable as one which is free from the shadow of retroactivity. However, it can also be maintained that this latter claim does not really distinguish the "retroactive contract" method of determining the amount of lost benefits from the proposed *Ex-Cell-O* remedy. An employer who is directly ordered by the NLRB to pay a predetermined amount of damages will be quite likely to reflect that economic burden in future bargaining intransigence.

Perhaps the most serious objection to the use of the retroactive contract principle is that it is possible that many contract agreements would never be reached if it were applied. The effect of the remedy would be tantamount to requiring the parties to negotiate a double contract. One would expect pressures at the bargaining table to mount because of the magnification of the stakes; it is likely that the parties would be unable to reach an agreement. The creation of such an impediment to agreement hardly seems to further the NLRA's objective of promoting industrial peace "by encouraging the practice and procedure of collective bargaining."[51]

Weaker unions would almost certainly find the retroactive contract remedy to be as ineffective as the present cease-and-desist-order remedy. Ultimately, one can question the fairness of any doctrine

section 8(d) does not prohibit the proposed remedy, *see* text accompanying notes 40-45 *supra*.

49. *See* Retail Wholesale, & Dept. Store Union v. NLRB, 385 F.2d 301, 307-08 (D.C. Cir. 1967).

50. Arguably union strength is less at the time of the remedy than it was at the date of the employer's initial refusal to bargain, *see* text accompanying notes 14-17 *supra*. However, it may be that this method, in certain circumstances, will produce results at least as accurate as those that would be derived from an NLRB determination of employee losses based on statistical data, *see* text accompanying notes 28-31 *supra*. This would seem to be the case especially where the union is strong; the remedy has been requested by unions in the past, *see, e.g.*, Retail Union v. NLRB, 385 F.2d 301, 307-08 (D.C. Cir. 1967).

51. NLRA § 1, 29 U.S.C. § 151 (1964).

which forces the injured party's representative to obtain relief by going to the wrongdoer and bargaining with him over the terms of reimbursement for the loss suffered. The possibility of adequate compensation for loss suffered from the illegal refusal to bargain would be enhanced if unions could begin the bargaining talks with the amount of the award for the employer's earlier unlawful act already determined.

It is therefore submitted that the preferable method of effectuating the make-whole remedy is that actually proposed by the interested unions—direct NLRB determination of the loss suffered by employees.[52] Separating this remedy from the negotiations about future contract terms will eliminate a touchy issue from a confrontation that is not likely to be smooth under any circumstances.[53]

The complexities which the proposed remedy portend for the system of review of NLRB certification decisions must not be overlooked. A "technical" section 8(a)(5) violation brings into play a lengthy process requiring an NLRB determination on the merits, entry of an order to bargain, and enforcement of that order at the court of appeals level if the employer is found to have committed an unlawful refusal to bargain. The proposed remedy will add to this already cumbersome process a supplemental NLRB hearing to establish employee loss. Enforcement of the resulting compensatory order will almost certainly require additional litigation in the court of appeals. It may be that Congress would prefer a system of direct review of representation proceedings to this time-consuming procedure. Such review would eliminate the need for "technical" 8(a)(5) violations. The earlier defeats of such proposals may have been due to the failure of Congress to comprehend all of the implications of a system of compensating employees for benefits lost because of

52. This is not to say that the NLRB should never use the retroactive contract approach. It has been stated that strong unions might find the remedy effective in certain circumstances, *see* Retail, Wholesale, & Dept. Store Union v. NLRB, 385 F.2d 301 (D.C. Cir. 1967). It should be open to the NLRB to determine *in each case* the method which it feels will most accurately measure the loss. This concept of allowing the NLRB to use the remedy it deems the best is consistent with the principle that once the *fact* of loss is established, it is crucial to find the method which would most accurately determine the amount lost. *See* text accompanying notes 28-32 *supra*.

53. A large compensatory award given at the critical time when contract negotiations are to begin would in effect force an employer to finance the union's "strike fund." A lump-sum payment at such a time would conceivably put the union in a position of much greater economic strength than it was in immediately after certification when bargaining should have begun. If this award led unions to resort more readily to the strike weapon to achieve success in the first contract negotiations, then it might have implications which are inconsistent with the purposes of the NLRA, as stated in section 1 (*see* text accompanying note 51 *supra*). In order to avoid these difficulties, the NLRB might withhold any compensatory order until contract negotiations between the parties had concluded. Furthermore, payment of compensation might be made over a period of months or years rather than in a lump sum. Spreading out payments could at the same time help alleviate the economic burden of the award.

8(a)(5) violations.[54] On the other hand, Congress may still wish to minimize litigation of representation issues; such litigation would probably follow every NLRB certification decision if there was a system of direct review.[55] The remedy proposed by the union in *Ex-Cell-O*—while creating a process of compensation that would be long and involved—has the advantage that it would probably limit such litigation to cases in which employers entertain genuine doubts about the NLRB's conduct of the representation proceedings. There would also be no problem of delay in such cases since an employer who knows that he is liable for losses stemming from his refusal to bargain will seek to resolve the dispute as quickly as possible.[56] It has also been suggested that the Board make liberal use of the 10(j)[57] injunction provision of the NLRA.[58] In cases involving "bad-faith"

54. *See* text accompanying notes 50 & 51 *supra*.

55. *See* S. REP. No 573, 74th Cong., 1st Sess. 5 (1935); H.R. REP. No. 1147, 74th Cong., 1st Sess. 7 (1935); 93 CONG. REC. 6444 (1947) (remarks of Senator Taft). Fears that such litigation would become automatic appear to be justified. In Leedom v. Kyne, 358 U.S. 184 (1958), an exception was fashioned to the policy that NLRB decisions arising out of certification proceedings were reviewable only as an incident to review of unfair labor practice cases. The Supreme Court held that a district court had original jurisdiction to strike down an NLRB certification order when it was made "in excess of [the NLRB's] powers and contrary to a specific prohibition in the Act," 358 U.S. at 188. Before Boire v. Greyhound, 376 U.S. 473 (1964), made clear that the *Leedom v. Kyne* rule was limited to instances where the NLRB flouts an express statutory command, 376 U.S. at 479, the *Leedom v. Kyne* "exception" threatened to swallow up the original policy. More than fifty cases in which employers sought to enjoin representation elections were pending in the lower federal courts at the time that *Boire v. Greyhound* reached the Supreme Court. *See* 56 Lab. Rel. Rep. Analysis 35-36 (June 29, 1964). *See also* Koretz, *Labor Law Decisions of the Supreme Court: 1963 Term*, 16 SYRACUSE L. REV. 1, 2-3 (1964); Note, *Labor Law—Judicial Review—District Court Has No Jurisdiction To Review Certification Proceedings Where Question Is Essentially One of Fact*, 43 TEXAS L. REV. 251 (1964).

56. A good example of the tactics presently resorted to by employers to delay litigation is contained in the trial examiner's decision in *Ex-Cell-O*, TXD—80—67, at 3-7 (March 7, 1967). Union-caused delay in the proceedings would not seem to be a problem since the primary union objective following certification is to obtain recognition and begin bargaining. But if prompt court review of representation issues is desired, it may be better to have Congress formulate a system of direct review, *see* text accompanying note 54 *supra*.

57. NLRA § 10(j), 29 U.S.C. § 160(j) (1964), which reads in pertinent part:

> The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

58. *See* Note, *The Need for Creative Orders Under Section 10(c) of the National Labor Relations Act*, 112 U. PENN. L. REV. 69, 86 (1963). In Madden v. Alberto Culver Co., 49 L.R.R.M. 2516 (N.D. Ill. 1961), a temporary injunction under section 10(j) was granted. It ordered the employer to meet at reasonable times for the purpose of collective bargaining; to accord recognition to the union; to negotiate on any matter relating to rates of pay, wages, hours of employment or any other term or condition of employment; to demand no unreasonable concessions or impose no unilateral changes in any term of condition of employment, or by any other means fail or refuse

refusals to bargain this might be a solution to the problem of delay in obtaining recognition of the union. But until Congress decides that a re-examination of the remedial provisions of the NLRA is needed,[59] the *Ex-Cell-O* proposal would seem to accord favorably with the mandate of section 10(c), which calls for dissipation of the effects of unfair labor practices.

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to bargain in good faith; and to sign a written agreement if an understanding was reached.

See also the recommendation that the NLRB use the 10(j) provision in cases of section 8(a)(3) violations in *Prepared Statement of Mr. Leslie Aspin, Summary of Findings of a Study of Reinstatement Under the National Labor Relations Act, Hearings on H.R. 11725 Before the Special Subcomm. on Labor of the House Comm. on Educ. and Labor*, 90th Cong., 1st Sess. 11 (1967); Note, *A Survey of Labor Remedies* 54 VA. L. REV. 38, 51-52 (1968); Comment, *supra* note 39, at 783 n.122. But another writer finds serious deficiencies in the suggestion to use section 10(j). Ross, *supra* note 13, at 319.

59. The House Committee on Education and Labor held hearings in 1967 on H.R. 11725, a bill designed to increase the effectiveness of the customary "reinstatement with back pay" order given by the NLRB for section 8(a)(3) violations. *See Hearings, supra* note 58. The bill contains no specific changes in the general remedial power of the NLRB under section 10(c), and would thus appear to have no effect on section 8(a)(5) remedies. However, the length of the hearings on the bill—they took up eight days in the month of August—would suggest that Congress may be receptive to other proposals intended to increase the effectiveness of the remedies for violations of the NLRA. Rectifying the consequences of an 8(a)(5) violation in the first bargaining contract situation may be considered a pressing subject for legislative attention if the NLRB finds the *Ex-Cell-O* proposal unworkable for any reason.